

Wang v. Mukasey, 04-71056

JAN 02 2008

THOMAS, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent. In order to survive appellate review, the IJ or BIA must identify "specific, cogent reasons" for an adverse credibility finding, and the reasons must be substantial and legitimately connected to the finding. *Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004). This means that the reason identified must "strike at the heart of the claim" to asylum. *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir.2004). "Minor inconsistencies . . . that do not relate to the basis of an applicant's alleged fear of persecution, [or] go to the heart of the asylum claim" do not generally support an adverse credibility finding. *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003). An adverse credibility determination may not be based on speculation or conjecture not supported by evidence in the record. *Ge v. Ashcroft*, 367 F.3d 1121, 1124-25 (9th Cir. 2004).

We independently review each ground the agency cites in support of an adverse credibility finding. *Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005). Here, Wang makes two independent claims for asylum—one based on China's population control program and the other based on his religion.

The BIA's reasons for rejecting Wang's testimony concerning his claim for asylum under China's population control program cannot be sustained, as the

majority agrees. I part ways with the majority, however, because I believe the BIA's reasons for finding the other aspects of his application not credible cannot be sustained either. The BIA relied on three major inconsistencies in Wang's claim of religious persecution: (i) how Wang came to the church; (ii) his physical mistreatment during detention for practicing his religion; (iii) the length of his detention and the timing of his escape.

With respect to how Wang came to the church, the Board is wrong in stating that Wang's statement in his application "does not comport" with his testimony. There is nothing inconsistent in these two statements; that he went to a mass "by chance" is entirely consistent with his having gone as a result of his connection to the Wong family, which was "by chance." An adverse credibility finding cannot be based on a "strained and unjustified reading of a single phrase" in the translated asylum application, as compared to his translated testimony. *He v. Ashcroft*, 328 F.3d 593, 602-03 (9th Cir. 2003); *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999). Neither can the fact that the testimony contained more detail than the asylum application provide substantial evidence in support of the adverse credibility finding. *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996). As Mr. Wang put it in his brief, his "asylum application consists of eleven pages, and the narrative of his claim is just two pages long. By contrast, Mr. Wang testified at

length on the witness stand, and the transcript of his testimony spans 136 pages. . . . [T]he Board cannot reasonably expect his asylum application to be as detailed as his oral testimony.”

Similarly, with respect to his physical mistreatment during detention, an omission in the application cannot support the adverse credibility finding. The BIA faulted Mr. Wang because he testified that he was physically mistreated while at the police station but did not mention that in his written application. “It is well settled that an applicant’s testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application.” *Lopez-Reyes*, 79 F.3d at 911; *Aguilera-Cota v. U.S.I.N.S.*, 914 F.2d 1375, 1382 (9th Cir. 1990).

Finally, with respect to the length of his detention and the timing of his escape, the majority faults Mr. Wang for not explaining the inconsistency between his initial testimony that he was detained for four days and his apparently changed testimony that he was detained for only two. When pressed, however, Mr. Wang clarified that he was detained for two days and escaped on the way to the main station. Because a two-day detention as opposed to a four-day detention would weaken Mr. Wang’s asylum claim, it is unlikely he was trying to deceive the IJ and more likely that he simply misspoke or was mistranslated. *See Damaize-Job v.*

INS, 787 F.2d 1332, 1338 (9th Cir. 1986) (“[M]inor discrepancies in date that are attributable to the applicant’s language problems . . . and cannot be viewed as attempts to enhance his claims of persecution have no bearing on credibility.”).

Because the grounds relied on by the BIA in upholding the adverse credibility finding were improper under this Court’s precedent, I respectfully dissent.